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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re MICHAEL T., a Person Coming
Under the Juvenile Court Law.

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHAEL T.,

Defendant and Appellant.

D052510

(Super. Ct. No. J214709)

APPEAL from a judgment of the Superior Court of San Diego County, Amalia L. Meza and Francis M. Devaney, Judges. Reversed.

The juvenile court declared 17-year-old Michael T. a ward of the court (Welf. & Inst. Code, § 602)¹ after sustaining allegations that he committed one count of arson (Pen. Code, § 451, subd. (d)) and one count of felony vandalism (Pen. Code, § 594,

¹ Statutory references are to the Welfare and Institutions Code unless otherwise specified.

subds. (a), (b)(1)). The court placed Michael on probation and entered a civil judgment against him for the amount of restitution.

Michael appeals, contending the true findings on both counts were not supported by substantial evidence.

FACTS

On the afternoon of December 26, 2006, Michael and five friends were walking across the playground at Fulton Elementary School in San Diego. One of them—not Michael—pulled off a jacket that had been hanging on the fence. He and two others—again, not Michael—tried to set the jacket on fire with cigarette lighters. Each of the three individuals had a cigarette lighter. Initially, the trio was unsuccessful because of windy conditions. The trio then placed the jacket on a plastic slide, which was part of the school's gym apparatus, and were able to light the jacket on fire. All six youths left the premises. The fire completely melted the slide and damaged the metal portion of the gym apparatus and the underlying rubber mat. The cost of repairing the damage was approximately \$50,000.

Police detective Gerry Kramer spoke to Michael on the telephone on January 4, 2007, the week after the incident.² Michael told Kramer that he was with the group who had set fire to the jacket and had walked away from the scene with the boys while the

² The adjudication hearing took place on January 16, 2008. Initially, the court granted Michael's request for informal supervision within the provisions of section 654.2 in lieu of filing a petition on the condition that Michael and his codefendants pay restitution to the San Diego Unified School District with the minors and their parents jointly and severally liable. On December 10 the court revoked the informal supervision because the restitution had not been paid and ordered the juvenile petition be reinstated.

jacket was smoking. Michael admitted to Kramer that he did not try to put out the fire, and he knew the actions of his friends were "stupid." After conducting an investigation of the fire, Kramer concluded that Michael did not start the fire and did not possess any of the cigarette lighters involved in setting the fire.

At the close of the prosecution's case-in-chief, defense counsel made a motion under section 701.1 to dismiss the petition. The court denied the motion.

Michael testified that he and two of his friends were playing on the school's basketball court while his three other friends were near the gym apparatus. Michael saw the trio hovering over something near the slide. Michael said he did not participate in setting the fire, did not encourage the other boys to do so and did not act as a lookout. Michael testified he did not have a lighter and was not aware that any of his friends had lighters until they were leaving the school yard.

On cross-examination, Michael denied he told Kramer that he had seen his three friends, who had started the fire, initially attempt to light the jacket on the ground and then on the rubber mat before moving the jacket to the slide. On rebuttal, Kramer testified that Michael had in fact told him that the trio who had started the fire first tried to do so with the jacket on the ground and then on the mat before moving it to the slide.

DISCUSSION

Michael contends there was insufficient evidence to support the true findings on the arson and felony vandalism allegations. We agree and find the juvenile court erred by denying Michael's motion under section 701.1 to dismiss the petition at the close of the prosecution's case-in-chief.

Under the prosecution's theory of this case, Michael was an aider and abettor to the arson and vandalism. A person aids and abets the commission of a crime when he acts with knowledge of the unlawful purpose of the perpetrator and the intent or purpose of encouraging or facilitating the commission of the crime, and his act or advice in some manner aids, promotes, encourages or instigates the commission of the crime. (*People v. Beeman* (1984) 35 Cal.3d 547, 560-561.) Neither presence at the scene of a crime nor knowledge of but failure to prevent it is sufficient to establish aider and abettor liability. (See *People v. Durham* (1969) 70 Cal.2d 171, 181; *In re Jose T.* (1991) 230 Cal.App.3d 1455, 1460.) However, mere presence at the scene of a crime may be considered with other meaningful evidence, such as companionship and conduct before and after the offense, in assessing aider and abettor liability. (*In re Lynette G.* (1976) 54 Cal.App.3d 1087, 1094.) In determining whether the evidence in this case establishes that Michael aided and abetted the arson and vandalism of school property, we view the evidence and draw all inferences in the light most favorable to the judgment. (*People v. Bloom* (1989) 48 Cal.3d 1194, 1208; *People v. Pre* (2004) 117 Cal.App.4th 413, 421.)

The evidence presented during the prosecution's case-in-chief established that Michael was present in the school playground when three of his friends set the jacket on fire. Further, when the trio set the fire at the gym apparatus, Michael and two other friends were in a different area of the playground—namely, the basketball court. There was no evidence that Michael instigated the arson and vandalism. There was no evidence that Michael aided the three friends who set the fire or promoted and encouraged their actions. Not only did the investigatory officer conclude that Michael did not set the fire,

he also concluded that Michael did not possess any of the cigarette lighters involved. The sum and substance of the evidence was that Michael was a bystander.

Defense counsel substantially made these points at the close of the prosecution's case-in-chief, when she moved under section 701.1 to have the petition dismissed. That motion should have been granted.

A motion under section 701.1 challenges the sufficiency of the prosecution's evidence at the close of its case-in-chief. In ruling on such a motion, a juvenile court weighs the evidence, evaluates witness credibility and decides if the prosecution's case against the defendant has been proved beyond a reasonable doubt. (*In re Andre G.* (1989) 210 Cal.App.3d 62, 66.) We review the court's ruling under the substantial evidence standard. (*Id.* at p. 65.)³ That is, we examine the record in the light most favorable to the judgment to determine whether there is substantial evidence such that " 'any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' " (*People v. Marshall* (1997) 15 Cal.4th 1, 34, italics omitted, quoting *Jackson v. Virginia* (1979) 443 U.S. 307, 319.) In doing so, we assume all facts in support of the ruling that may reasonably be deduced from the evidence (*In re Man J.* (1983) 149 Cal.App.3d 475, 482), and we accept the juvenile court's credibility determinations (see *People v. Ochoa* (1993) 6 Cal.4th 1199, 1206). We do not reassess

³ Our review of the evidence is limited to that which was before the juvenile court at the time it ruled on the motion under section 701.1. (See *People v. Cole* (2004) 33 Cal.4th 1158, 1212-1213 [reviewing an analogous motion for acquittal under Pen. Code, § 1118.1, made at the close of the prosecution's case-in-chief].)

the evidence in order to substitute our opinion for that of the juvenile court. (*In re George T.* (2004) 33 Cal.4th 620, 630-631.)

In denying the section 701.1 motion, the juvenile court stated: "I think that the circumstances of the setting of the fire, plus the statements of the minor before, during and after this occurred, establishes circumstantially that he was an aider and abettor." The court cited *People v. Campbell* (1994) 25 Cal.App.4th 402, 408-410, noting in that case one codefendant "did not independently happen by the scene of the crime" and was with the principal and returned with him "to the scene of the crime and together they approached the victims . . . and their concerted action reasonably implied a common purpose."

In *People v. Campbell, supra*, 25 Cal.App.4th at pages 408 to 410, the Court of Appeal upheld convictions of attempted robbery and attempted murder because the aider and abettor "knew . . . and shared [the principal's] intent to rob [the victim] and that in a supportive role, he affirmatively facilitated [the principal]." (*Id.* at p. 410.) The aider and abettor in *Campbell* was seen with the perpetrator, both before and during the crime—and assumed a position in front of the victims "to intimidate and block them, divert suspicion, and watch out for others who might approach. Such conduct is a textbook example of aiding and abetting." (*Id.* at p. 409.) This case is clearly distinguishable from *Campbell*. There was no evidence—either direct or circumstantial—in the prosecution's case-in-chief that Michael instigated the arson and vandalism, facilitated or promoted the crimes or acted as a lookout. He was a bystander, nothing more. The undisputed evidence that Michael went to the playground with five

friends—including the three who set the jacket on fire—and left with the same five friends did not establish—directly or inferentially—that he aided and abetted the crimes. Michael was on the basketball court, not in the area of the gym apparatus. Under these circumstances, the fact that Michael went to the school and left the school with the three perpetrators is not enough to make him more than an innocent bystander.

No evidence was presented in the defense presentation or the prosecution's rebuttal that established Michael instigated, aided, promoted or encouraged the three minors who set the fire. Substantial evidence did not support the true findings.

DISPOSITION

The true findings on the arson and felony vandalism counts are reversed. The order of wardship is reversed. The civil judgment finding Michael liable for restitution is reversed.

HALLER, J.

WE CONCUR:

BENKE, Acting P. J.

McDONALD, J.